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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 381

NORTHWESTERN PACIFIC RAILROAD COMPANY, *Appellant*,

vs.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,

and

CITY OF SAN RAFAEL, et al., *Appellees*.

On Appeal from the United States District Court for the Northern District of California, Southern Division

Motion to Affirm

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The Atchison, Topeka and Santa Fe Railway Company, an intervening defendant below, and an appellee in the above-entitled cause, moves that the judgment of the District Court be affirmed on the ground that the questions presented on this appeal are so unsubstantial as not to need further argument.

STATEMENT OF THE CASE

Appellant Northwestern Pacific Railroad Company, hereinafter referred to as NWP or appellant, operates a railroad in interstate commerce within the state of California

from a point near the Oregon border at Eureka, California, on the north, to a southern terminus at Tiburon, California, on San Francisco Bay, where it connects with The Atchison, Topeka and Santa Fe Railway Company, hereinafter referred to as Santa Fe. Santa Fe floats the freight cars to Richmond for movement beyond on its trains. Through routes and joint rates apply via the Tiburon interchange between Santa Fe and Northwestern Pacific. The Santa Fe ferries also operate to San Francisco under hire of NWP for connection with Southern Pacific Company, hereinafter sometimes referred to as SP, the parent of appellant. NWP has another terminus at Schellville, where it also connects with SP. This terminus is located on the northeastern edge of San Francisco Bay.

On July 20, 1961, appellant's Puerto Suello Tunnel was closed by cave-ins resulting from a fire. On August 21, 1961, appellant filed its application with the Interstate Commerce Commission under Sections 1(18)-1(21) of the Interstate Commerce Act for authority to abandon that portion of its main line approaching and through the tunnel. Approval of the application would leave the line south of the tunnel to and from Tiburon as an "island," closing the long existing "Tiburon gateway."

This matter, docketed as Finance Docket No. 21725, resulted in ten days of hearings at San Francisco, California. Hearing briefs were submitted and on September 17, 1962, the report of the hearing examiner was issued recommending that the application be denied. Exceptions were filed by appellant with the Interstate Commerce Commission and replies filed by the protesting parties. Oral argument was heard before the Interstate Commerce Commission, Division 3, in May of 1963, and the Commission, Division 3, issued its unanimous report in June, 1963, adopting the examiner's

report and adding additional explanation why the application should be denied. NWP thereafter filed a petition with the full Commission seeking a finding that an issue of general transportation importance was involved. After denial of said petition appellant filed its action in the District Court seeking to set aside the order of the Interstate Commerce Commission. Santa Fe intervened as a defendant, filed a brief, and participated in the ensuing oral argument. In its decision dated April 17, 1964, the District Court denied appellant's petition and dismissed the complaint. Every step of the way has been decided against petitioner.

Unlike most abandonment proceedings where the denial of the application requires the applicant to continue operations during the pendency of court review, there has been for over the past three years a *de facto* abandonment of the tunnel and the service through it. This has resulted in continued curtailed rail service to shippers and receivers south of the tunnel, and the through route NWP-Santa Fe with interchange at Tiburon has remained closed.

QUESTIONS PRESENTED

It is, of course, the responsibility of the appellant to enumerate those questions which it deems of sufficient merit to warrant oral argument before the Court. However, appellant's statement of "Questions Presented" is no more than an outline of argument. Stated correctly the questions presented would more nearly read as follows:

1. Will rebuilding the tunnel constitute an undue burden on interstate commerce and appellant?

2. Was proper consideration given to the position of the parent, Southern Pacific Company?

3. Did the District Court hold correctly that the order of the Interstate Commerce Commission is not confiscatory?

4. Did the District Court hold correctly that the "Constitutional Fact Doctrine," as enunciated in *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920), is not applicable?

5. Is the decision of the Interstate Commerce Commission properly based upon considerations of public convenience and necessity?

6. Was the "substantial evidence rule" correctly applied by the District Court?

ARGUMENT

Every contention in the petition has been fully considered and disposed of at one and more of the preceding stages of this litigation. Indeed appellee would stand on what has already been said in the unanimous opinions and orders of the hearing examiner, the Commission and the District Court, except that some specification and summarization seems advisable in the hope of reducing this Court's task.

1. The Reconstruction of the Tunnel Will Not Result in an Undue Burden Upon Interstate Commerce or Upon Appellant.

Appellant complains that the cost of rebuilding the tunnel will exceed its previous two years' net revenue. This is based on its cost estimate of approximately $850,000 to rebuild. In actuality appellant's evidence, based upon the use of all factors and matters most favorable to it, has shown that the appellant would actually be better off if the application were denied than if it were granted. Appellant's evidence showed, as stated by the examiner, that for 1959, 1960 and the first five months of 1961:

> "... NWP calculates that its net decreases in revenues if the tunnel had been closed in the described periods would have been $209,930, $154,570, and $60,476. Further offsetting the decreases in revenues by certain railway

> tax accruals and annual interest of 5 percent on certain capital costs allegedly avoidable by abandonment, it arrives at the somewhat smaller net decreases of $156,819, $101,656, and $38,478 [footnote omitted]." (Last seven lines, sheet 5, examiner's report; see also second full paragraph, 320 I.C.C. at 23.)

Appellant contends that the restoration of the tunnel would cost a minimum of $850,000 which would be equal to over two years' income and be a great burden upon it but still it must concede that if the tunnel is restored to operation, its net income would actually be increased in such proportion as to return more than 18 per cent per annum on its investment.

Appellant insists that the area south of the tunnel has little or no industrial or carload future, that the railroad business in the area has been declining and that alternate means of transportation service are available. The record contains uncontradicted statistical evidence of the number of cars of traffic originating or terminating at points south of the tunnel for the years from 1951 to 1960. The I.C.C. examiner found that the traffic handled as late as 1958 did not appreciably differ in volume from that handled in 1952. The volume in 1960 was the lowest for any year considered but there had been a definite upturn in net income of NWP for the first five months of 1961.

Furthermore, it must be remembered that the effects of the proposed abandonment will not be confined to main line points south of the tunnel. If appellant is allowed to abandon the tunnel the Tiburon gateway will remain closed, resulting in a loss of competitive rail service to many points outside of southern Marin County.

Whether adequate alternate means of transportation is available is best answered by quoting from the Commission's report:

"The segment herein proposed to be abandoned is a portion of the applicant's main line. Shippers located thereon, south of the tunnel, since its collapse have had their daily rail service decreased. Their all-rail route to and from northern and eastern points is cut off, and they are faced with the necessity of utilizing truck transportation which, as to certain commodities, involve higher costs with less satisfactory handling of traffic." (320 I.C.C. at 22.)

2. Proper Consideration Was Given to the Position of the Parent, Southern Pacific Company

Appellant insists that Southern Pacific Company, of which appellant is a wholly owned subsidiary, has been excluded from the picture. On the contrary both the examiner and the Commission expressly gave attention to the fact that if the application were granted Southern Pacific System's net revenues would be enhanced. As the Commission stated:

"Under the circumstances described, if the applicant were an independent carrier it would not be difficult to justify a denial. As stated, however, it is a member of the Southern Pacific System and as such, consideration must be given to the argument that while the applicant's revenue position in 1959, 1960, and the first 5 months of 1961 would have been adversely affected had the tunnel been closed, the combined revenues of the applicant and its parent would have been improved to such a degree that the system would have derived incomes exceeding the revenue decreases of the applicant. Although, as previously stated, the Southern Pacific System's income, as a result of the abandonment would be increased by $58,265, $33,722, and $21,476 for the described periods, the applicant in many instances will receive a lower division of the joint rate established via the alternate route than it

enjoyed when interchanging with the Santa Fe at Tiburon." (320 I.C.C. at 23-24.)

The Commission concluded:

> "Upon consideration of all the evidence of record we are not convinced that the benefits to the applicant and the Southern Pacific from the proposed abandonment through increased system revenues and avoidance of capital expenditures would outweigh the adverse effects which will be suffered by the shipping public should the application be granted." (320 I.C.C. at 24.)

Thus it can readily be seen the Southern Pacific Company was not "excluded from the picture" at all. Full consideration was given to the effect of the abandonment on NWP and NWP-SP. Appellant is merely aggrieved at the Commission's decision but such aggrievement cannot turn a fully litigated question into an appealable issue.

3. The Commission Order Is Not Confiscatory.

As is pointed out earlier, appellant's evidence clearly shows, and the Commission found, that the net income of NWP would be substantially greater if the application were denied than if it were granted. There is obviously then no taking of property without due process by a denial of the application.

NWP was the sole applicant before the Commission and is the sole appellant in this Court. It is apparently appellant's claim that Southern Pacific Company property is being taken without due process. Nothing in this record would support such a claim. As the Commission said: ". . . the question to be resolved is a matter of only the degree of profits by the railroads." The evidence shows only that the Southern Pacific System's net revenues would be en-

hanced if the application were granted. Under these circumstances the order of the I.C.C. cannot be confiscatory.

It is readily apparent that there is in fact no confiscation and that the issue of confiscation was merely contrived as a means of seeking trial *de novo*. The real issue remains purely one of public convenience and necessity and there is no issue of constitutional rights. The courts have disposed of contentions similar to appellant's as follows: The right to conduct a common carrier business is not plenary but subject to many limitations, and denial of this qualified right is not a denial of a constitutional right calling for the court to exercise its independent judgment on the facts. *Transamerican Freight Lines, Inc. v. United States*, 51 F. Supp. 405 (D.C. Del. 1943); a utility cannot raise a constitutional issue as a subterfuge where the real issue involved is whether regulatory authority had been validly exercised. *Lang Transp. Corp. v. United States*, 75 F.Supp. 915 (S.D. Cal. 1948); the claim that an order deprives a carrier of liberty and property contrary to the Fifth Amendment will not be considered where such claim is a subterfuge predicated on the invalidity of an I.C.C. order. *Baltimore & O. R.R. v. United States*, 305 U.S. 507 (1939).

4. The Constitutional Fact Doctrine Is Not Applicable.

Appellant insists, the District Court holding otherwise, that the "constitutional fact doctrine" as enunciated in *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920) is applicable to this proceeding and that the District Court should have exercised its independent judicial judgment as to both the law and the facts.

The *Ben Avon* case involved the setting of water rates for the future, the utility claiming confiscation of its property caused by the level of the rates. The Supreme Court

held that the reviewing court could determine the question of confiscation according to its own independent judgment both as to the law and the facts. However the doctrine has never been applied in other than rate cases; see, e.g., *Railroad Comm'n of Texas v. Rowan & Nichols Oil Co.*, 310 U.S. 573 (1940), applying the substantial evidence test. In *Alabama Pub. Serv. Comm'n v. Southern Ry.*, 341 U.S. 341, 348 (1951) this Court made it abundantly clear that the "constitutional fact doctrine" has no application to abandonment proceeding. The Court concluded:

> ". . . whatever the scope of review of Commission findings when an alleged denial of constitutional rights is in issue, it is now settled that a utility has no right to relitigate factual questions on the ground that constitutional rights are involved. [Citations omitted.]"

5. The Decision Is Based Upon Considerations of Public Convenience and Necessity.

Appellant suggests that the decision of the Interstate Commerce Commission will require it to rebuild the tunnel and restore an uneconomic route through the tunnel for the benefit of the Santa Fe. Appellant's position of course assumes that there are other adequate service routes, but the Commission did not find this to be the fact. Moreover, while it is true the denial of the application will result in preservation of the long existing through routes and joint rates via Tiburon, which will benefit Santa Fe, the Commission's decision is premised on the fact that preservation of the Tiburon interchange is required as a matter of public convenience and necessity.

The undisputed evidence, as taken from appellant's exhibits shows that:

> ". . . out of 15,095 carload shipments handled by applicant in 1959 between main line points south of the

tunnel (including San Francisco) on the one hand, and main line and branch points north of the tunnel on the other, some 10,024 carloads were interchanged at Tiburon. In 1960, 7,948 out of 12,124 cars used the Tiburon gateway and for the first 5 months of 1961, 3,324 out of 5,117 cars used that point of interchange." (320 I.C.C. at 22-23.)

The interchange with Santa Fe at Tiburon was a part of a movement at joint rates over through routes. If the application had been granted, the interchange at Tiburon and the long existing through routes and joint rates between NWP and Santa Fe would be virtually eliminated. Traffic which would have been interchanged at Tiburon and moved through the tunnel would be diverted to the Schellville interchange where NWP makes connection with Southern Pacific, rather than Santa Fe.

One important effect of this diversion became apparent immediately. Prior to the tunnel closure there was six day per week rail service via Tiburon. Since the fire and the consequent diversion of traffic from the Tiburon interchange, the service has had to be reduced to twice weekly south of the tunnel. As the examiner observed:

> "In the five months ending December 31, 1960, prior to the tunnel fire, 3,392 carload shipments were interchanged at Tiburon, of which 3,107 were delivered to Santa Fe and 285 were received. In the five months ended December 31, 1961, NWP delivered 75 cars to Santa Fe at Tiburon and received 41 for a total of 116 carload shipments. Revenues accruing to Santa Fe on traffic moving via Tiburon declined from $700,955 for the first period to $36,972 in the second." (Sheet 5, examiner's report.)

The examiner found:

> "The protesting shippers regard the rail service as having been satisfactory prior to closing of the tunnel,

but since that time have experienced reduction from daily to twice-weekly service with accompanying fluctuations in transit time, bunching of deliveries, and other inconveniences." (Sheet 7, examiner's report.)

The Tiburon route was important. As pointed out previously, in 1959 for example, over 10,000 cars moved via the Tiburon gateway through this tunnel. The examiner found that:

"Shippers obtained faster service for certain traffic when the Tiburon route was specified and on that account such route was used even though the rates sometimes were lower via Schellville. In one test period, July and October, 1960, and January and April, 1961, some 129 out of 716 carload shipments routed via Tiburon could have been routed via Schellville at lower transportation costs." (Sheet 6, examiner's report.)

In light of all the facts the examiner's finding was that:

"The through route maintained by NWP and Santa Fe via Tiburon reflects a material and valuable contribution to the interstate and intrastate transportation system in the area. It is demonstrated that such system is capable of affording daily service by railroad at NWP main line points when both of the major roads connecting with NWP have opportunity to compete for the involved traffic." (Sheet 8, examiner's report.)

Moreover, appellant conceded that the granting of the application and the resulting diversion of traffic to the Schellville route would transfer very substantial revenues from both Santa Fe and NWP to SP. Its testimony was that SP's gross revenues would be increased $602,088 annually, based on the 1959 traffic levels, created by a diversion in gross revenue of $169,544 from appellant and $432,544 from Santa Fe.

To offset this gross revenue loss of over $432,000, Santa Fe would reduce its expenses by only $20,000. The examiner found:

> "As the frequency of Santa Fe schedules to and from its rail terminus at Richmond is not dictated alone by the amount of the Tiburon interchange, there would be little saving of rail costs, but it is estimated that reduction in the frequency of car ferry service between Richmond and Tiburon would produce savings of about $20,000 a year." (Sheet 6, examiner's report.)

So, in addition to the deterioration of service which would follow the granting of this application, the abandonment of this line would divert a very substantial amount of revenue from Santa Fe, not to appellant, but to appellant's parent, Southern Pacific Company, with only relatively insignificant reductions in Santa Fe's operating expense to accompany the loss of revenue.

6. The Substantial Evidence Rule Was Correctly Applied by the District Court.

The District Court did not outline the testimony and data upon which its findings were based. It merely stated that there was substantial evidence to support the examiner's findings. Surely no other conclusion could be reached.

Appellant's use of the doctrine of *Purcell v. United States*, 315 U.S. 381 (1942) is incorrect. *Purcell* merely held that the Commission may authorize abandonment where the line would be destroyed by a federal flood control project, and that the relocation cost is a relevant factor to consider. In the present situation, plans to widen the highway at the location of the present tunnel have not been definitely adopted and no actual construction work is contemplated for five to ten years. No exact estimate of the cost of the

project has been prepared and indeed alternatives were still being studied. On such inconclusive evidence certainly the Commission and the District Court would be entitled to ignore any speculative costs which the State may incur by reason of the tunnel not being abandoned. Moreover, the Commission found that unlike *Purcell*, "no superior benefits are to be derived by the public through abandonment of the segment in question."

Appellant finds fault with the Commission's use of the revenue of the entire NWP system, instead of that of the area where the line was sought to be abandoned, in determining that the system revenue of previous years was an "indication that the need for transportation in the area is not undergoing an immediate decline." Appellant feels that such a finding would preclude abandonment in all situations where there is a system net and violates the rationale of *Southern Ry. v. North Carolina*, 376 U.S. 93 (1964).

Read in context, we simply do not perceive how the Commission's language conflicts in any way with the *Southern* case.

CONCLUSION

It is submitted that the foregoing arguments show that the District Court ruled correctly on the questions sought to be presented on this appeal, and that the questions are so unsubstantial as not to need further argument. Accordingly, the Motion to Affirm should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, FREDERICK G. PFROMMER, attorney for The Atchison, Topeka and Santa Fe Railway Company, one of the appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on September 17, 1964, at San Francisco, California, I served copies of the foregoing Motion to Affirm on the several parties hereto, as follows:

1. On the United States, by mailing a copy in a properly addressed envelope, with airmail postage prepaid, to The Solicitor General, William H. Orrick, Jr., Esq., Assistant Attorney General, and John H. D. Wigger, Esq., Attorney, Department of Justice, Washington 25, D.C., and with first-class postage prepaid to Cecil F. Poole, Esq., United States Attorney, for the Northern District of California, at Room 422, Post Office Building, San Francisco, California.

2. On the Interstate Commerce Commission, by mailing a copy, in a duly addressed envelope, with airmail postage prepaid, to Robert W. Ginnane, Esq., its General Counsel, and Robert S. Burk, Esq., its Attorney, Interstate Commerce Commission, Washington 25, D.C.

3. On the Cities of San Rafael, San Anselmo, Fairfax and Sausalito, California; County of Marin; Marin Industrial Development Foundation; Cangros Gravel and Fuel Co., Inc.; Chris Craft Sales of San Rafael; Colonial Wax Products Corporation of California; Golden Gate Distributing Company; Henry Hess Company; California Newspapers, Inc. (San Rafael Independent Journal); McPhail Fuel Co.; PBM Inc.; Rice Supply, Inc.; A. G. Schoonmaker Co.; Service Lumber Co.; and Shamrock Materials, Inc., intervening defendants, by mailing copies in a duly addressed

envelope, with first-class postage prepaid to their respective attorneys of record:

Graham, James & Rolph,
Boris H. Lakusta, Esq.
F. Myron Bull, Jr., Esq.
310 Sansome Street
San Francisco, California 94104

4. On The People of the State of California and The Public Utilities Commission of California, intervening defendants, by mailing copies in duly addressed envelopes, with first-class postage prepaid, to their respective attorneys of record:

Richard E. Tuttle, Esq.
Hector Anninos, Esq.
State Building
San Francisco, California

5. On the appellant, Northwestern Pacific Railroad Company, by mailing a copy in a duly addressed envelope, with airmail postage prepaid, to its attorney of record:

Randolph Karr, Esq.
670 Pacific Electric Building
610 South Main Street
Los Angeles, California 90014

FREDERICK G. PFROMMER